**2002 BNH 036 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF NEW HAMPSHIRE**

In re: Bk. No. 02-12846-MWV
Chapter 11

LCC Financial Corp.,
Debtor

*William S. Gannon, Esq.*
*Attorney for Debtor*

*Victor G. Milione, Esq.*
*Attorney for Citicorp Leasing, Inc.*

## MEMORANDUM OPINION

The Debtor, LCC Financial Corp., filed an original petition under Chapter 11 of the Bankruptcy Code on September 16, 2002. The Court issued an order approving the emergency use of cash collateral on September 19, 2002. On September 20, 2002, the Court issued an order providing for the payment of certain wages. On September 26, 2002, the movant, Citicorp Leasing, Inc. ("CLI"), filed its motion to (1) vacate the cash collateral order; (2) vacate the wage order; and (3) order relief from the automatic stay. It is this motion that is now before the Court along with the Debtor's motion for continued use of cash collateral. The Court held hearings on these matters on October 10 and November 7, 13, 14 and 18, 2002.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## FACTS

The Debtor is in the business of providing financing for the lease or sale of motor vehicles. The type of motor vehicles that are leased or financed are commonly referred to as "muscle vehicles," of which eighty percent are Corvettes.

The Debtor is owned by APS Financial Services, LLC, which, in turn, is owned by Daniel Wilensky and Paul Hirshberg. The Debtor has two affiliates, Corvette City USA Corp., located in Manchester, New Hampshire, and Corvette City of Georgia, Inc., located in Atlanta, Georgia. These latter two entities sell and service automobiles, including the off lease-off retail vehicles owned by the Debtor. None of the other entities have filed bankruptcy.

The movant, CLI, finances the Debtor. When the Debtor has a lease or retail transaction, it applies to CLI for financing on approved transactions. CLI advances the funds for the purchase of the vehicle and, in turn, is granted a security interest in the financial paper as well as a lien on the title to the vehicle. This financing arrangement is pursuant to and secured by the Loan and Security Agreement - Motor Vehicle Lease Financing (Movant's Ex. B) and the Loan and Security Agreement - Retail Installment Sales Contract (Movant's Ex. C). These security agreements grant a security interest in all assets of the Debtor to CLI, including all vehicles, whether financed or not. For purposes of these motions, the validity, extent and priority of CLI's security interest has not been challenged.

Since the commencement of the litigation, an audit has been conducted, which was funded by the Movant and General Electric Capital Corporation ("GECC"). Unfortunately, most of the testimony during the hearings concerned audit procedures, i.e., a dispute over what was requested and what was provided to the auditors, and really has no relevance to the issue at hand. However, the testimony of Susan Jacobs O'Connell, CEO of the auditing company, did verify what the Debtor had basically admitted, that its financial records were in poor shape. Her testimony also raised questions as to the

accounting of certain assets and liabilities, pre and post-petition, which this Court believes were not adequately addressed by the Debtor.

## DISCUSSION

Under section 363 of the Bankruptcy Code, the Debtor is not allowed to use cash collateral without the movant's consent or an order of this Court. Section 363(e) conditions the use of cash collateral on a finding by the Court that the movant, in this case CLI, is adequately protected. See 11 U.S.C. § 363(e). The burden of proof of adequate protection is on the Debtor. See id. at § 363(o).

It is not disputed that the total amount owed to CLI is in excess of $19,000,000. However, the parties have stipulated that the value of the collateral is $13,476,660, subject to reductions for payments made during the case. See Stipulation for Order Establishing Value of CLI Collateral for All Purposes, Court Doc. 76. Since the value of the collateral determines CLI's secured claim, its secured claim is $13,476,660, subject to the reductions mentioned above.

Adequate protection is defined by section 361 of the Bankruptcy Code as follows:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by —
>
> > (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
> >
> > (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease or grant results in a decrease in the value of such entity's interest in such property; or
> >
> > (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361. The Court finds that, because the value of the collateral is equal to the value of the secured debt and the movant has a lien on all of the assets, adequate protection must come from assets

other than those in which the movant currently has a security interest. The Debtor proposes to make periodic payments that are covered by the stipulated value of the collateral and in an amount that is, in fact, only a portion of the amount to which the movant is already entitled.

As to providing additional security, the movant already has a lien on all of the assets, meaning that there are no free assets and that no new receivables are being generated. The Debtor proposes that CLI finance either new transactions or transactions concerning off lease-off retail inventory, which it currently holds, which would then increase the cash flow to the movant. The Court does not believe that this proposal constitutes adequate protection. First and foremost, neither the Debtor nor this Court can make the movant finance new transactions, and it has specifically indicated that it will not finance transactions of the Debtor, directly or indirectly, going forward. Second, even if the transaction includes the financing by a third party for an off lease-off retail vehicle, any payment made to the movant would reduce its lien and debt by the same amount thereby providing no new adequate protection. The final subsection of section 361 provides for indubitable equivalent, which this Court finds has not been offered and cannot be offered based on the facts of this case.

The Court will now discuss the Debtor's prospect for a successful reorganization. The parties, by stipulating to the value of the collateral, have agreed that there is no equity in the collateral. The same argument can be made that the collateral is necessary for a reorganization, but there must be a reasonable chance of a reorganization. United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., (In re Timbers), 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988). After five days of testimony, what does the record show? Francis McCaughey, a Vice President of CLI with respect to its vehicle financing portfolio, testified that the Debtor has been hurt by the overall economy and sees no turnaround in the near future. Mr. Wilensky agrees that the economy has hurt the Debtor, but is more optimistic about a quicker turnaround. In June 2001, the Debtor moved its offices from Massachusetts to Manchester, New Hampshire, which caused problems with employee retention and record-keeping in general. The Debtor currently wishes to hire accounting help in an attempt to rectify this problem. To keep the Debtor in

business, the record indicates that over $1,000,000 can be traced to "out of trust transactions." While the Debtor argues that the movant knew about these trust transactions and that they were accounted for to the movant, thereby impliedly indicating the consent of the movant, at the very least, the out of trust transactions indicate that the Debtor could not have lasted as long as it did out of bankruptcy without this method of financing.

The number of off lease-off retail vehicles which the Debtor has in inventory has shown a sharp increase over a recent period of time. The Debtor currently occupies space in facilities leased to one of its affiliates, Corvette City USA. There was testimony that there was litigation concerning the underlying leases and, by agreement, the Debtor and its affiliates must vacate the premises. Mr. Wilensky testified that neither he, his partner, Mr. Hirshberg, nor the parent company, APS, intends to make any further investment into the Debtor.

Both parties spent extensive time on charts that purported to show the value of the collateral versus the amount of the debt for the period November 2002 through March 2003, the term of the proposed cash collateral use. The Debtor submitted Exhibits 3, 6 and 30, which were testified to by Mr. Wilensky. The movant submitted Exhibit W, which was testified to by Mr. McCaughey. Surprisingly, the Debtor's exhibits show that the value of the collateral is continually greater than the amount of the indebtedness. The movant's show the opposite, i.e., that the collateral decreases in relation to the amount owed. Like most projections, the differing conclusions are a result of the assumptions used in the projections. The Court does not have to decide which is more accurate. The value of all assets, including the income stream, vehicle values and all other assets, are already included in the stipulated collateral value and secured claim. Adequate protection must arise out of collateral not otherwise included in the stipulated value. Thus, for the purposes of this Court's finding on the issues before it, the charts become irrelevant.

The Debtor further argues that a plan of reorganization is in prospect. First, it has filed, as an exhibit in these proceedings, a draft proposed plan of reorganization. Debtor's Ex. 15. This plan

transfers the CLI portfolio to a trustee for purposes of liquidation or running it out. In the opinion of the Court, the proposed plan does not address the vehicle inventory in which the movant has a security interest. It further provides that current equity holdings would be canceled and that the Debtor would remain in business, but gives no indication as to how it will continue or who will finance it. The plan provides payments to creditors if, and only if, certain loan to collateral ratios are achieved by the Debtor.

In further support of its ability to reorganize, the Debtor has placed into evidence certain letters from lending institutions. The Debtor, however, admits that as of November 18, 2002, it has no commitment. The Court gives little or no weight to these types of letters, usually produced on the eve of trial. In short, the Debtor has not convinced the Court that it can either sell or refinance the CLI portfolio.

The status of the off lease-off retail vehicles further leads to the decision that relief must be granted. While there is a question of degree, there is no question that these vehicles are depreciating. Their numbers have increased dramatically, and the testimony supports the proposition that their numbers will continue to increase because of the economy and an aging portfolio. The Debtor proposes that these vehicles be refurbished so that they can be sold or leased at a market rate. No one would question the fact that, if they are refurbished, they would be worth more than their current value or auction value. However, the Court is not convinced that the Debtor has the financial ability to complete the refurbishing program. CLI will not lend, and there is little evidence of any other funding at this time. While auction values are less than market values, a secured creditor has the right to dispose of its collateral however it may choose, as long as it is done in a commercially reasonable manner. The value of these vehicles is decreasing, and there is insufficient evidence that there is adequate protection for this decrease in value.

## CONCLUSION

For all of the above reasons, the Court finds that the Debtor has not met its burden of convincing the Court that there is adequate protection for the continued use of CLI's cash collateral. Consequently,

the motion for further use of cash collateral is denied, and the Debtor's use of cash collateral is terminated forthwith.

The Court further finds that there is no equity in the collateral held by CLI and that the Debtor has not met its burden that a plan of reorganization is in prospect. The motion for relief from the automatic stay is granted.

Also before the Court is CLI's motion to vacate the wage order. This apparently was not pursued by CLI during the hearing and, in any case, the Court denies that request to the extent that it is not already moot.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 21st day of November, 2002, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge